

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

MARK N. BISHOP,)	CIVIL ACTION NO. 3:01CV0087
)	
Plaintiff,)	
)	
v.)	
)	<u>MEMORANDUM OPINION</u>
JO ANNE B. BARNHART,)	
Commissioner of Social Security,)	
)	
Defendant.)	JUDGE JAMES H. MICHAEL, JR.

This case comes before the court on the plaintiff's objections to the April 26, 2002 Report and Recommendation of the presiding United States Magistrate Judge. The Magistrate Judge recommended that the court affirm the final decision of the Commissioner of Social Security to deny the plaintiff benefits. For the reasons set forth below, the plaintiff's objections shall be **OVERRULED**, the Magistrate Judge's Report and Recommendation shall be **ACCEPTED**, the Commissioner's decision shall be **AFFIRMED**.

I.

On May 21, 1998, the plaintiff applied to the Social Security Administration for Disability Insurance Benefits under Title II of the Social Security Act, 42 U.S.C.A. §§ 401-33 (West 1994 & Supp. 2002), alleging he became disabled and unable to work

beginning May 1, 1993, due to a back problem, depression, and painful disorders in the neck, ankle and leg. The plaintiff's application was denied initially and upon reconsideration. (R. at 24.) The plaintiff requested an administrative hearing, which was held on September 28, 1999. *Id.* At the hearing, the Administrative Law Judge ("ALJ") heard testimony from the plaintiff and an impartial vocational expert ("VE"). Based on the testimony at the hearing and upon plaintiff's medical record, the ALJ determined that the plaintiff was unable to return to his former employment as a warehouse worker in shipping/receiving, but that the plaintiff retained the residual functional capacity to make an adjustment to other work. (R. at 25.) The ALJ, consistent with his burden, called upon the testimony of the VE to determine whether there were other jobs existing in significant numbers in the national economy which the plaintiff could perform given his residual functional capacity, age, education and work experience. *See Smith v. Schweiker*, 719 F.2d 723, 725 (4th Cir. 1984); *Grant v. Schweiker*, 699 F.2d 189, 192 (4th Cir. 1983). This produced a number of jobs the VE believed would be available. (R. at 31-33.)

On December 3, 1999, the ALJ determined that based on the plaintiff's work limitations, which he inferred from the medical reports and the testimonial evidence of the VE, the plaintiff's injury was sufficient to satisfy the requirements of a severe impairment, but it did not meet or equal the requirements of a listed impairment. (R. at 25-26.) The ALJ further determined that the plaintiff retained the residual functional capacity to perform simple, unskilled, full-time light work. (R. at 30.) These included work as a packaging machine filler, bottling line attendant, mechanic assembler, and a hand packer.

(R. at 31.) Therefore, the ALJ concluded that the plaintiff was “not disabled” under the Act and denied Social Security benefits.

II.

The specific issue before the ALJ was whether the plaintiff suffered from a disability, as defined in the Social Security Act. *See* 42 U.S.C.A. § 423(d)(1)(A) (West 1994 & Supp. 2002); (R. at 372.) The Social Security Administration has developed a five-step sequential evaluation process to determine whether a claimant has a disability. *See* 20 C.F.R. §§ 404.1520, 416.920 (2003). Accordingly, an ALJ must consider, in sequence, whether a claimant: (1) is working; (2) has a severe impairment; (3) has an impairment that makes him disabled as a matter of law; (4) can return to his past work; and (5) if not, whether he retains the capacity to perform specific jobs that exist in significant numbers in the national economy. *See id.* at §§ 404.1520, 416.920. The claimant bears the burden of production and proof during the first four steps of the inquiry. *See Hunter v. Sullivan*, 993 F.2d 31, 35 (4th Cir. 1992) (per curiam). At the fifth step, the burden shifts to the Commissioner to prove that jobs exist in significant numbers in the national economy that the claimant can perform. *See id.*

The parties do not dispute the instant plaintiff’s *prima facie* showing of disability. Thus, the burden rests with the Commissioner to establish the availability of work that the plaintiff is capable of performing. The issue before the court is whether the Commissioner carried that burden on the fifth step of the sequential inquiry.

The matter was referred to the presiding Magistrate Judge to set forth findings, conclusions, and recommendations for its disposition. *See* 28 U.S.C.A. § 636(b)(1)(B)

(West 1994 & Supp. 2002). On April 26, 2002, the Magistrate Judge found that the final decision of the Commissioner was supported by substantial evidence. He reasoned that the ALJ's decision was based upon his finding that the plaintiff's testimony regarding the impact of his claims is not entirely credible. From an exertional point of view, the plaintiff was able to engage in activity that would fit the light work category. (R. at 30.) This determination was supported by substantial evidence in the record. (R. at 200, 203-207, 286-288.) However, the most menial gainful tasks would be precluded if plaintiff needed to lie down as much as the plaintiff testified. (R. at 64-65.) Moreover, according to the VE, there was availability of work for one suffering from depression and experiencing psychological effects as the plaintiff suffered. (R. at 63.) The Magistrate Judge recommended that the court affirm the final decision of the Commissioner, grant judgment to the defendant and dismiss the case from the docket of the court.

The plaintiff filed a timely objection to the Magistrate Judge's Report and Recommendation on May 9, 2002. Specifically, the plaintiff raised two objections: (1) that the Magistrate Judge erred in accepting the credibility determination of the ALJ with respect to the plaintiff's testimony; and (2) that the Magistrate Judge erred in finding that substantial evidence supported the Commissioner's decision when there was significant contradiction in the relevant medical and vocational evidence of record.

The court reviews *de novo* those portions of the report or specified proposed findings or recommendations to which objection was made. *See* 28 U.S.C.A. § 636(b)(1) (West 1994 & Supp. 2002). The court must determine whether the Commissioner's

findings are supported by substantial evidence, and whether the correct legal standards were applied. *See* 42 U.S.C.A. § 405(g) (West 1994 & Supp. 2002); *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Hays v. Sullivan*, 907 F.2d 1453, 1456 (4th Cir. 1990). As the presiding officer at the administrative hearing, the ALJ makes factual determinations and resolves evidentiary conflicts, including inconsistencies in the medical evidence. *See Hines v. Bowen*, 872 F.2d 56 (4th Cir. 1989). The court gives great deference to the ALJ’s factual determinations and credibility assessments and reviews them only for clear error. *See Estep v. Richardson*, 459 F.2d 1015, 1017 (4th Cir. 1972); *Newport News Shipbuilding and Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988). Nonetheless, the court is not restrained by deference to the administrative decision in determining whether the correct legal standards were applied—a *de novo* determination of legal issues is obligatory. *See Hines*, 872 F.2d at 58; *Meyers v. Califano*, 611 F.2d 980, 982 (4th Cir. 1980). Determining whether the evidence presented by the ALJ to support his decision amounts to substantial evidence is a question of law and therefore will be considered anew.

Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Richardson*, 402 U.S. at 401 (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). It “consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance. If there is evidence to justify a refusal to direct a verdict were the case before a jury, then there is ‘substantial evidence.’” *Hays*, 907 F.2d at 1456 (quoting *Laws v. Celebrezze*, 368 F.2d

640, 642 (4th Cir. 1966)). The court must consider evidence that both supports and detracts from the Commissioner's conclusion; it may not affirm by isolating a specific quantum of supporting evidence. *See NLRB v. Consolidated Diesel Elec. Co.*, 469 F.2d 1016, 1021 (4th Cir. 1972). The Commissioner's decision, "if supported by substantial evidence [in the record as a whole], must be affirmed even though the reviewing court believes that substantial evidence also supports a contrary result." *Estep*, 459 F.2d at 1017. When reached by means of an improper standard or misapplication of the law or in the event that substantial evidence does not support the Commissioner's decision, factual findings made by the ALJ are neither conclusive nor binding. *See Coffman v. Bowen*, 829 F.2d 514, 517 (4th Cir. 1987); *Meyers*, 611 F.2d at 982.

Bearing the aforementioned in mind, the court turns to the application of the law to the facts of the instant case.

III.

A.

Plaintiff asserts in his first objection that the Magistrate Judge erred by accepting the credibility determination of the ALJ when it was based upon an inference contrary to the Commissioner's own regulations. This court is required to give deference to the ALJ's determination of the plaintiff's credibility. *Newport News Shipbuilding and Dry Docket*, 841 F.2d at 543. "The ALJ is required to make credibility determinations - and therefore sometimes must make negative determinations - about allegations of pain or other nonexertional disabilities." *Hammond v. Heckler*, 765 F.2d 424, 426 (4th Cir. 1985)

(quoting *Smith v. Sweiker*, 719 F.2d 723, 725 n.2 (4th Cir. 1984)). However, the ALJ has a duty of explanation and should specifically refer to the evidence that informed his decision, especially when it comes to evaluating pain, because this judgment is such a difficult one. *Id.* Moreover, the facts relied upon must be supported by the record and the inferences must be reasonable. *See Norfolk Shipbuilding and Drydock Co. v. Faulk*, 228 F.3d 378, 386 (4th Cir. 2000). The evidence supporting the ALJ's determination must "be sufficient more than a scintilla, but less than a preponderance." *Id.*

Plaintiff asserts in his objection that the ALJ's credibility determination is unsupported by the record because it was based upon improper inferences drawn from the plaintiff's unsuccessful attempts to return to work. However, plaintiff mischaracterizes the basis of the ALJ's decision. The ALJ's credibility determination was based upon several factors. First, the ALJ determined that from an exertional point of view, the plaintiff was able to engage in activity that would fit the light category of work. This conclusion was based on the fact that none of the plaintiff's treating or consulting doctors appeared to limit his activities below the level of light work. (R. at 200, 203-207, 286-88.) Only second to this factor is the ALJ's observation that the plaintiff's allegations regarding his impairments and his inability to work were not entirely credible because, although he claims that he has been disabled since May 1, 1993, he tried to perform light duty work selling vacuum cleaners in May, 1995. (R. at 29.)

This court and the Court of Appeals for the Fourth Circuit have never heretofore considered whether it is proper for an ALJ to consider the plaintiff's unsuccessful attempt

to return to work in evaluating the plaintiff's credibility. However, this issue is immaterial based upon the facts of this case because sufficient evidence supports the ALJ's decision that the plaintiff's allegations were not credible. The standard for evaluating the credibility of a claimant's subjective assessment of pain must be based on "medical evidence that could reasonably produce the pain alleged and not [on] objective evidence of the pain or its degree." *Tackett v. Heckler*, 627 F. Supp. 545, 549 (4th Cir. 1986). The ALJ's decision that the plaintiff's allegation regarding the impact of his disability was not entirely credible is well supported by medical evidence. The ALJ does not rely on objective evidence of the pain or its degree. Therefore, the fact that the plaintiff's unsuccessful work attempt in part influenced the ALJ's credibility determination does not make the ALJ's decision without sufficient support. The plaintiff, in essence, is asking this court to draw different inferences from the facts. However, this court cannot disregard an ALJ's decision merely because other inferences might have been more reasonable. *See Norfolk Shipbuilding and Drydock Co.*, 228 F.3d at 386.

B.

In his second objection, the plaintiff asserts that the ALJ's decision is not supported by substantial evidence because the ALJ failed to carry his burden to identify jobs the plaintiff can successfully perform that also exist in significant numbers in the economy.

An ALJ can discharge his burden to identify jobs that exist in significant numbers in the economy by calling upon the testimony of a vocational expert ("VE") to determine whether there were other jobs which the plaintiff could perform given his residual

functional capacity, age, education and work experience. *See Smith v. Schweiker*, 719 F.2d 723, 725 (4th Cir. 1984); *Grant v. Schweiker*, 699 F.2d 189,192 (4th Cir. 1983). To determine whether the ALJ's decision is supported by substantial evidence, the court must determine whether the ALJ's hypothetical questions to the VE were proper. An ALJ has discretion in framing hypothetical questions as long as they are supported by substantial evidence in the record. However, an affirmative answer to a hypothetical question does not constitute substantial evidence in support of the Commissioner's decision when the hypothesis fails to conform to the facts. *See Swaim v. Califano*, 599 F.2d 1309, 1312 (4th Cir. 1979). Furthermore, "for a vocational expert's opinion to be relevant or helpful, it must be based upon a consideration of all other evidence in the record . . . and it must be in response to proper hypothetical questions which fairly set out all of claimant's impairments." *See Walker v. Bowen*, 889 F.2d 47, 50 (4th Cir. 1989).

The plaintiff argues that ALJ's hypothetical questions to the VE were improper because they assumed that the plaintiff's depression was mild and not disabling. The plaintiff asserts that this conclusion is not based upon substantial evidence in the record and is contradicted by all of the relevant medical testimony. Therefore, he concludes that the ALJ's decision that the plaintiff could perform work that existed in significant numbers in the economy cannot be upheld because it is based upon hypothetical questions that do not fairly set out all of the claimant's impairments.

There is no doubt that the ALJ recognized that the plaintiff suffered from depression. Indeed, the ALJ's decision is well-documented with medical opinions that

recognize the plaintiff's depression. (R. at 27-30.) Plaintiff, however, errs once again in characterizing the ALJ's finding. The ALJ did not disregard the plaintiff's depression, but rather, found that despite the fact that the plaintiff suffered from depression, his depression did not preclude work-related functions.

The relevant medical testimony that plaintiff cites in his objection does not indicate that the plaintiff's depression precludes work-related functions. Plaintiff points to the findings of the State Disability Determination ("SDD") physician, the consultative examiner hired by the Commissioner, and Mr. Bishop's treating physician, as indicating that plaintiff was significantly limited by his depression. This is a mischaracterization. Although the SDD physician chose "often" over "never" and "seldom" in describing the plaintiff's deficiencies of concentration, persistence, or pace resulting in failure to complete tasks in a timely manner, it is also noteworthy that he did not choose "frequent" or "constant." (R. at 232.) Furthermore, in describing the plaintiff's ability to understand, remember, and carry out detailed instructions, and ability to maintain attention and concentration for extended periods, the SDD physician merely chose "moderately limited."

Moreover, in making his decision that the plaintiff's depression did not preclude work-related functions, the ALJ relied heavily on the "Medical Assessment of Ability To Do Work-related Activities (Mental)" form completed by plaintiff's primary caretaker physician, Dr. Ernest Pugh. (R. at 28.) Dr. Pugh indicated in this form that plaintiff's ability to make occupational, performance, and personal-social adjustments to work were all good or very good, with the exception of his ability to deal with stress, maintain

attention and concentrate, and understand, remember, and carry out complex instructions, which Dr. Pugh rated as fair.¹ (R. at 276-277.) According to the Commissioner's regulations directing how opinions shall be considered, the Commissioner should give "more weight to opinions from . . . treating sources, since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of . . . medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings or from reports of individual examinations." *See* 20 C.F.R. § 404.1527 (d)(2) (2002). This is precisely what the ALJ did in reaching his conclusion that the plaintiff's depression did not preclude work-related functions.

The ALJ gave controlling weight to the medical examination of the plaintiff's primary caretaker physician, (R. at 28-29.), but also based his decision on all of the other relevant medical testimony. Therefore, it cannot be said that the ALJ's determination that the plaintiff's depression did not preclude work-related functions was not based upon substantial evidence. The plaintiff, in essence, is asking this court to draw different inferences from the facts. However, this court cannot disregard an ALJ's decision merely because other inferences might have been more reasonable. *See Estep*, 459 F.2d at 1017. Therefore, the ALJ's hypothetical questions to the VE were appropriate and constitutes substantial evidence in support of the Commissioner's decision. Because this court finds

¹ "Good" is defined as "ability to function in this area is limited but satisfactory," and "fair" is defined as "ability to function in this area is seriously limited, but not precluded." (R. at 276.)

that the ALJ's decision is supported by substantial evidence, the plaintiff's objection accordingly shall be overruled.

III.

Accordingly, the court concludes finds that the Commissioner's decision was supported by substantial evidence. The court affirms and adopts the Magistrate Judge's Report and Recommendation with respect to the conclusion that the Commissioner's decision be affirmed, with judgment to the defendant, and the case be dismissed from the docket of the court.

An appropriate Order this day shall issue.

ENTERED: _____
Senior United States District Judge

Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

MARK N. BISHOP,)	CIVIL ACTION NO. 3:01CV00087
)	
Plaintiff,)	
)	
v.)	<u>FINAL ORDER</u>
)	
JO ANNE B. BARNHART,)	
Commissioner of Social Security,)	
)	
Defendant.)	JUDGE JAMES H. MICHAEL, JR.

By order dated December 14, 2001, the court referred the above-captioned case to the presiding United States Magistrate Judge for proposed findings of fact and a recommendation disposition. On April 26, 2002, the Magistrate Judge filed his Report and Recommendation, wherein he recommended that the court affirm the final decision of the Commissioner of Social Security. The plaintiff filed timely objections to the Report and Recommendation on May 9, 2002. The Commissioner did not respond to the objections. The court reviews *de novo* those portions of the report or specified proposed findings or recommendations to which objection was made. *See* 28 U.S.C.A. § 636(b)(1) (West 1994 & Supp. 2002). Having thoroughly considered the Report and Recommendation, the plaintiff's objections, the applicable law, and the documented record, and for the reasons stated in the accompanying Memorandum Opinion, it is accordingly this day

ADJUDGED, ORDERED, AND DECREED

as follows:

1. The plaintiff's objections to the Report and Recommendation shall be, and they hereby are, OVERRULED;

2. The findings and decision recommended in the Magistrate Judge's April 26, 2002 Report and Recommendation shall be, and they hereby are, ACCEPTED;

3. The final decision of the Commissioner shall be, and it hereby is, AFFIRMED;

4. For the reasons stated in the Magistrate Judge's Report and Recommendation and the accompanying Memorandum Opinion, the Commissioner's December 10, 2001 Motion for Summary Judgment shall be, and hereby is, GRANTED;

5. This case shall be, and it hereby is, STRICKEN from the docket of the court.

The Clerk of Court hereby is directed to send a certified copy of this Order and the accompanying Memorandum Opinion to Magistrate Judge Crigler and to all counsel of record.

ENTERED: _____
Senior United States District Judge

Date